COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

HARVARD DEDICATED ENERGY LIMITED Application for Competitive Electricity Supplier License Pursuant to 220 CMR 11.00 *et seq.*	)	D.T.E. 02- ___

PETITION OF HARVARD DEDICATED ENERGY LIMITED FOR WAIVER OF CERTAIN COMPETITIVE SUPPLIER LICENSING REQUIREMENTS PURSUANT TO 220 CMR 11.08

INTRODUCTION

Pursuant to 220 CMR 11.08, Harvard Dedicated Energy Limited ("HDEL") hereby petitions the Department of Telecommunications and Energy ("Department") for a waiver of certain of the Department's competitive supplier licensing requirements set forth at 220 CMR 11.00 *et seq*. As described further below, HDEL will have only one customer, President and Fellows of Harvard College ("Harvard"), a large institutional purchaser of electricity that is the corporate parent of HDEL, and Harvard's affiliates (collectively "Harvard Group"). HDEL will not offer electricity for sale to the general public in any rate class. Because of the exclusive and fiduciary relationship between HDEL and the Harvard Group, its only customer, several of the Department's consumer protection regulations that would ordinarily apply to a competitive supplier are unnecessary as applied to HDEL. Some of these requirements could hinder HDEL in its efforts to procure electricity supply for the Harvard Group on optimal terms. HDEL therefore requests a waiver of these requirements pursuant to 220 CMR 11.08.

FACTUAL BACKGROUND

Harvard and the Creation of HDEL

Harvard has a unique place in the history of the Commonwealth. It was established in 1636 by vote of the Great and General Court of the Massachusetts Bay Colony. G.L. Const. Pt. 2, C. 5, § 1, Art. 1. On June 9, 1650, the Great and General Court of Massachusetts approved Harvard President Henry Dunster's charter of incorporation. The Charter of 1650 established the President and Fellows of Harvard College (also known as the "Harvard Corporation"), a seven-member board, which is the oldest corporation in the Western Hemisphere.

Harvard has grown to become one of the largest corporate entities in the Commonwealth. It has over 14,000 employees, including 8,400 in the City of Cambridge, making it the largest employer in the City.[1] Harvard is also the largest consumer of electricity in the Cambridge Electric Light Company ("CELCo") service territory. In 2001, Harvard's various buildings, facilities, and dormitories consumed approximately 168,000 MWh of electricity, which accounted for over 10 percent of CELCo's total sales.[2]

Since March 1, 1998, Harvard has met nearly all of its electricity needs through standard offer service ("SOS") provided by CELCo.[3] For the past several months, Harvard has been investigating

[1] In addition to the Cambridge campus, Harvard has campuses and facilities in Allston, Southborough, Watertown, Petersham, Concord, Bedford, and Somerville.
[2] While the Harvard Group includes facilities located in the Boston Edison Company ("BECo") service territory, those facilities constitute a very small percentage of the Harvard Group's total electricity usage.
[3] Several of Harvard Group's buildings in Cambridge and Bedford are supplied by a competitive supplier, and several others are supplied by default service. Collectively, these buildings account for a small percentage of the Harvard Group's total electricity usage.

options for meeting all of its electricity needs through a competitive supplier. It has done so for two reasons. First, SOS will expire in three years; it is not a long-term solution to Harvard's electricity supply needs. Harvard believes it would be imprudent to wait until near the end of the standard offer period to secure a replacement for SOS.

Second, the SOS price is not market-based, although the Department has enhanced the correlation between standard offer prices and the costs of providing the service through judicious use of the Standard Offer Service Fuel Adjustment ("SOSFA"). *See, e.g., Standard Offer Service Fuel Adjustments*, DTE 00-66, 00-67, and 00-70 (December 4, 2000 letter order). There are several factors that could lead one to conclude that the current and projected SOS rates are above the market price of electricity. The SOSFA is based on a fuel adjustment factor that is calculated with reference to the rolling twelve month averages of natural gas and oil price indices. Thus, the fuel adjustment factor may remain stable or increase even as current electricity prices, which are influenced more by current and projected fuel prices, decrease. Further, should the fuel indices fall below the trigger point and the SOSFA be eliminated, SOS prices will not fall below the price floors contained in the Department's restructuring orders. The SOS price floors may also exceed the market price of electricity, even with no SOSFA.[4]

Through its investigation, Harvard has found that its status as a retail customer limits its options for buying competitive electricity supply. Because of its size and the nature of its operations, Harvard has many of the characteristics of a wholesale purchaser of electricity. For example, a town with a population and employment base such as Harvard's could form a municipal light department pursuant to

G.L. c. 164, § 34, and purchase electricity directly from the wholesale markets. But Harvard remains a retail customer under the current statute and it must, therefore, rely on a retail supplier.[5]

Harvard has found, however, that the low prices in the wholesale markets are not being efficiently transferred to the retail market by the State's active competitive suppliers. This is mainly due to the fact that many of the wholesale suppliers that could otherwise provide service to a customer as large as Harvard have chosen not to become licensed retail suppliers in Massachusetts. The number of active retail suppliers in Massachusetts remains fairly small, and Harvard believes it is unlikely that a request for proposals from this group would result in prices as favorable as those that could be solicited through a request for proposals from all wholesale suppliers doing business in the ISO New England control area.

To gain more direct access to the wholesale suppliers and more control over its electricity supply options, Harvard created HDEL to act as the electricity supplier for the buildings and facilities in which Harvard pursues its educational and charitable purposes.[6] HDEL is a corporation established pursuant to G.L. c. 180 as a membership corporation, whose sole member is Harvard. It will have only one customer for its service, namely the Harvard Group. HDEL will not seek or accept orders to provide service to any retail customer other than the Harvard Group. In order to provide such retail

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[4] The stipulated, non-inflation adjusted SOS price floor for CELCo is 4.2 cents/kWh for 2002, 4.7 cents/kWh for 2003, and 5.1 cents/kWh for 2004 and the first two months of 2005.

[5] The Department's regulations define "retail customer" as "a customer located in Massachusetts that purchases electricity for its own consumption and not for resale in whole or in part." 220 CMR 11.02. *Compare* G.L. c. 164, § 1 ('"Retail customer", a customer who purchases electricity for its own consumption.')

[6] Due to pre-existing arrangements involving the Harvard Group, HDEL would also be supplying electricity to several entities that are not directly related to Harvard's educational and charitable purposes. Harvard Planning and Real Estate leases commercial space to the Holyoke Center and to the Inn at Harvard, and supplies electricity to those spaces pursuant to the terms of a commercial real estate lease. A portion of Rosovsky Hall, which is used by Harvard Hillel, is supplied with electricity in a similar manner through the Harvard Faculty of Arts and Sciences. The remainder of Rosovsky Hall and two Metropolitan District Commission lighting arrays (at the Weeks Bridge and John

service to its corporate parent, however, HDEL must be licensed by the Department as a competitive supplier.

The Competitive Supplier Licensing Process

The Legislature authorized the Department to promulgate and administer the regulations governing the licensing of competitive suppliers and electricity brokers. G.L. c. 164, § 1F(1). The Department's licensing regulations are set forth at 220 CMR 11.05. To become and remain a licensed competitive supplier in Massachusetts, an applicant must comply with these regulations, which require:

?? Submission of an application, which should contain the following items, among other things:

?? Corporate information and documents (including a copy of the Articles of Organization or Incorporation and by-laws);

?? A statement (with appropriate citation to corporate articles or by-laws or other operative documents) that acting as a competitive supplier is not an *ultra vires* purpose of the entity;

?? Customer service and regulatory contact information;

?? Brief description of the nature of the business being conducted, including types of customers to be served and geographic area in which services are to be provided

?? A statement that the Applicant will comply with the Department's information disclosure regulations, 220 CMR 11.06;

?? Documentation of technical ability to generate or otherwise obtain and deliver electricity, or provide other proposed services;

F. Kennedy Park) are billed for electricity directly by Harvard. HDEL would assume these responsibilities under the proposed arrangement.

    ?? Documentation of financial capability (such as the level of capitalization or corporate parent backing) to provide proposed services;

    ?? Documentation that the competitive supplier is a NEPOOL participant or will meet its transaction requirements through a contractual arrangement with a NEPOOL participant;

    ?? Evidence or documentation of attendance at a competitive supplier training session to be sponsored by the Massachusetts distribution companies;

?? Compliance with the Department's billing and termination regulations set forth in 220 CMR 25.00, 27.00, 28.00, and 29.00;

?? Ongoing compliance with the Department’s information disclosure requirements set forth in 220 CMR 11.06;

?? Compliance with the Department’s customer authorization requirements set forth in 220 CMR 11.05(4).

?? Compliance with 220 CMR 11.05(5), which states that “a competitive supplier may not use the services of any entity to facilitate or otherwise arrange for the purchase and sale of electricity to retail customers, unless such entity has been licensed as an electricity broker by the Department pursuant to 220 CMR 11.05(2).

The Department’s information disclosure requirements are extensive. *See* 220 CMR 11.06. To comply, a competitive supplier must provide the Department with an information disclosure label, which must include information on the price to be charged and price variability, customer service contacts, and fuel, emissions, and labor characteristics associated with the supplier’s resource portfolio.

The supplier must also prepare terms of service, including actual pricing structure, length and type of contract, and a number of consumer protection notifications.

ARGUMENT

I. THE DEPARTMENT SHOULD GRANT HDEL A WAIVER OF CERTAIN OF ITS LICENSING REGULATIONS FOR GOOD CAUSE SHOWN PURSUANT TO 220 CMR 11.08.

If HDEL planned to sell electricity to the public at large, it would willingly comply with all of the Department's licensing and consumer protection requirements. However, HDEL will neither seek nor accept retail customers other than the Harvard Group. Because of this arrangement, many of the Department's licensing requirements, which are designed to protect retail customers at large, are unnecessary as applied to HDEL, and may hinder HDEL in fulfilling its obligations to its corporate parent.

A. The Regulations From Which HDEL Seeks a Waiver Are Not Required To Protect HDEL's Only Retail Customer.

The Department's licensing and information disclosure requirements are designed to protect Massachusetts customers, especially residential and small commercial customers who may not have a sophisticated understanding of the restructured electricity markets. This is appropriate given the Department long history of consumer protection and the Legislature's directive "to provide retail customers with the utmost consumer protections contained in law." G.L. c. 164, § 1F(1). For a retail supplier with only one customer, which is both a sophisticated institutional consumer of electricity and its corporate parent, many of these requirements are unnecessary.

1. Harvard's Size and Sophistication Make It Highly Resistant To Abuse From a Competitive Supplier.

Most of the Department's licensing and information disclosure requirements are meant to protect consumers from a number of possible unscrupulous practices by competitive suppliers. For example, the price and price variability disclosure requirements in 220 CMR 11.06(2) prevent suppliers from advertising a price that may not represent what consumers will actually be charged or that could increase with little or no warning. The fuel, emissions and labor characteristics disclosure requirements prevent suppliers from misleading consumers about the origin of the electricity they are purchasing.

A large institutional purchaser such as Harvard does not need to be protected in the same manner as residential and smaller commercial customers. In fact, a customer the size of Harvard can, to a great extent, dictate the characteristics of the electricity it wishes to purchase and the contractual terms through its request for proposals. While it cannot dictate the price, there is little chance that Harvard will be misled about what price it will be paying for electricity. Further, for a very large customer, legal remedies that predate the Restructuring Act are much more meaningful than for residential customers for whom the cost to pursue such remedies will far exceed any likely recovery.

2. The Corporate Relationship Between HDEL and Harvard Makes Abuse Even Less Likely.

HDEL was created by Harvard and charged with the responsibility to provide Harvard with electricity on terms most favorable to Harvard, within parameters set by Harvard. As a direct corporate affiliate of Harvard, HDEL owes a fiduciary obligation to Harvard to fulfill this mission. This obligation is stronger than even the obligation of a competitive supplier to observe the Department's consumer protection regulations. Failure to comply with the Department's regulations could result, at most, in suspension or revocation of a supplier's license or fines for unauthorized switching of service.

A serious breach of HDEL's fiduciary obligation to Harvard, however, could result in much larger civil penalties or even criminal liability on the part of HDEL officers and employees. Further, HDEL's charter provides little or no incentive for unscrupulous behavior toward its single customer. HDEL is not like other retail suppliers; its success will not be judged by how profitably it acquires customers and resells electricity to them. Its success will be measured by how closely it meets Harvard's expectations for the reliability and cost of its electricity supply. These corporate expectations and obligations will be more than sufficient to prevent improper behavior by HDEL.

B. Certain of the Department's Regulations Will Hinder HDEL in Fulfilling Its Obligations to Harvard.

Some of the information disclosure requirements that protect residential and small business customers could actually be counterproductive as applied to HDEL. For example, the most basic contract term for most customers is price. The Department's regulations require competitive suppliers to disclose the average price for electric generation at four levels of consumption, which vary for residential and commercial customers. 220 CMR 11.06(2). This information would be helpful for most residential and commercial customers, whose consumption will likely correspond to one of the required disclosure levels. For very large customers, however, price will be an individually negotiated and highly confidential term that could change depending on the day (or even the hour) that the contract is executed. Mandatory disclosure of price terms would be uninformative for customers of sufficient size, and anathema to potential suppliers of such customers.

The same is true of other disclosures, such as fuel and emissions characteristics, that might reveal trading practices wholesale traders would prefer to keep confidential in the context of a bilateral contract with a large customer. If these characteristics are important to Harvard, they will be included in

HDEL's request for proposals, and wholesale suppliers will respond accordingly. In the absence of such a request, however, requiring HDEL to demand this information from its suppliers and publish it in the form of a disclosure label will likely result in a suboptimal response to the HDEL solicitation.

C. Specific Regulations for which HDEL Seeks a Waiver.

The lack of any benefit to Harvard from imposing all of the Department's regulations on HDEL, and the likelihood that some of these regulations will hinder HDEL in fulfilling its obligations to its only retail customer, together constitute good cause for granting a waiver of certain of these regulations pursuant to 220 CMR 11.08. Granting this waiver also poses no threat of harm to other electricity consumers, as HDEL will be serving no customers other than the Harvard Group. HDEL therefore requests a waiver of the following licensing and information disclosure regulations:

- **11.05(2)(b)(10)**, which requires a statement that the Applicant will comply with 220 CMR 11.06;
- **11.05(2)(e)**, regarding ongoing compliance with information disclosure requirements;
- **11.05(3)**, which requires compliance with the Department's Billing and Termination of Generation Service Requirements, 220 CMR 25.00, 27.00, 28.00, and 29.00;
- **11.05(5)**, regarding conducting business with unauthorized entities;[7]
- **11.06(2)**, regarding preparation of an information disclosure label;
- **11.06(3)**, regarding disclosure of certain terms of service;
- **11.06(4) and (5)**, which require distribution of disclosure labels and terms of service, and the preparation and distribution of an annual booklet; and
- **11.06(6)**, regarding information disclosure in advertising.[8]

[7] It is likely that this requirement would not apply in any event to the wholesale brokers or marketers with which HDEL would be dealing, and that it is directed at unauthorized persons or entities performing the functions of retail brokers.

II. GRANTING HDEL'S REQUEST FOR A WAIVER PURSUANT TO 220 CMR 11.08 WILL FURTHER THE PUBLIC INTEREST BY ENHANCING COMPETITION WHILE PROTECTING IMPORTANT GOALS OF THE RESTRUCTURING ACT.

Granting HDEL's request for a waiver will not only do no harm to electricity consumers in Massachusetts, it will also promote competition in the CELCo and BECo service territories while furthering other important goals of the Restructuring Act.

A. HDEL's Arrangement Will Encourage the Development of Retail Competition in the CELCo Service Territory.

Retail competition has been slow to take hold in all of the utility service territories in Massachusetts. The CELCo service territory is no exception. Only eight percent of the retail load in the CELCo service territory is served by competitive suppliers, and essentially all of that is purchased by 29 commercial and industrial customers; not a single residential or G-0 class customer was taking service from a competitive supplier in December 2001. *See* DOER Customer Migration Data.[9]

A low migration rate alone, of course, does not mean that the market is not functioning efficiently. In the CELCo service territory, however, migration rates continue to be very low despite the fact that (1) current standard offer prices are at or above current market prices for power in the ISO New England control area and (2) over 40 percent of CELCo's distribution customers take default service which, at over 6 cents per kWh, should offer opportunities for market entry to competitive suppliers. Thus, it appears that factors other than the current price of default or standard offer service are responsible for the lack of competition in the CELCo service territory.

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[8] HDEL will engage in no advertising.

[9] www.state.ma.us/doer/pub_info/migrate.htm

Granting a license to HDEL will provide a much needed boost to competition in the CELCo service territory by allowing one of the company's largest customers to leave SOS. This development would do more than just markedly increase the migration rate for the CELCo service territory.[10] It would make a strong statement to suppliers and other customers that the competitive market does provide a viable alternative to SOS. Because Harvard will not be able to return to SOS once it leaves, the clear message will be that at least one large customer believes market-based prices will be competitive with standard offer prices for the remainder of the standard offer transition period.

Putting Harvard's sizable load in play by migrating from SOS would have an immediate positive impact on the addressable market for competitive suppliers, which should attract more retail suppliers to Massachusetts. HDEL is also optimistic that one or more of the wholesale suppliers it eventually does business with will choose to become licensed Massachusetts competitive suppliers. Eventually, Harvard may well migrate to a more traditional relationship with such an unaffiliated competitive supplier. While Harvard sees the creation of HDEL as a necessary step given the current state of the retail market, it is an arrangement that can be revisited once the retail market is sufficiently robust.

B. Allowing HDEL to Act as a Retail Supplier for Harvard Furthers Other Important Goals of the Restructuring Act.

While providing retail customers with viable competitive options is an important goal of the Restructuring Act, it should not be pursued without regard to the other goals of the Act. The proposed arrangement between HDEL and Harvard furthers several of these other goals. First, the Department has recognized that allowing utilities to recover their stranded costs through a non-bypassable and non-discriminatory transition charge is a basic principle of restructuring in Massachusetts. *See, e.g.,*

[10] While migration rates should not be viewed as the sole indicium of the health of a market, other things being equal,

Fitchburg Gas and Electric Light Company, D.T.E. 97-115/98-120 (January 15, 1999); G.L. c. 164, § 1G(a)(1). The proposed arrangement between HDEL and Harvard will not bypass the utilities involved in any way, and will have no negative impact on their recovery of transition charges.[11] Similarly, Harvard will not avoid other consumption-based charges, such as those that support the Renewable Energy Trust Fund and energy efficiency programs, and HDEL will comply with the Renewable Portfolio Standard once it is effective. These characteristics make the proposed arrangement more advantageous than other options such as self-generation.

C. Approving the HDEL Application Would Be Consistent with the Department's Historical Efforts to Bring Competition to Retail Markets.

Should the Department approve the arrangement between HDEL and Harvard, it would not be the first time the Department has encouraged an innovative approach to bringing competition to retail markets. The Department recognized early on that "one of the primary objectives of offering retail choice to electricity consumers of Massachusetts is to give them more options for meeting their energy needs." *Cambridge Electric Light Company/ Commonwealth Electric Company*, DPU/DTE 97-111 (February 27, 1998), at 53. It has acted accordingly by, among other things, bringing both SOS and default service prices closer in line with the costs incurred by utilities to provide those services; making customer information available to competitive suppliers; and requiring utilities to offer advanced metering. *See, e.g., Default Service Pricing and Procurement*, D.T.E. 99-60-B (October 6, 2000); *Competitive Markets Initiative*, DTE 01-54 (October 15, 2001); *Advanced Metering*, DTE 01-28 (May 18, 2001).

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the migration of such a substantial portion of SOS load to a competitive supplier will be viewed favorably by both customers and suppliers.

The Department's efforts to promote competition pre-date the implementation of the Restructuring Act, however. For example, in the early 1990s, the Department revised its standard for reviewing contracts offered to non-core customers of local gas distribution companies, finding that such contracts provide net benefits to firm ratepayers, and thus should be approved, if incremental revenues from the contracts exceed incremental costs. *Boston Gas Company*, DPU 92-259 (April 30, 1993). This new approach accomplished several important goals. First, it allowed LDCs to compete on a level playing field for customers who had other viable supply options, such as inter-fuel switching. Second, it adopted a standard that is required to build efficient markets, whether based on a monopolistic or competitive model: "economic efficiency in rate setting is achieved when the rates charged reflect the cost of providing an incremental unit of output, so that customers receive an accurate price signal upon which to base consumption." *Id.* at 31. Finally, "in articulating its distinction in the energy industry between core and non-core gas customers, the Department . . . moved away from a regulatory framework based on service offerings (i.e., firm service vs. interruptible service), toward a regulatory framework based on customer characteristics." *Id.* at 21.

HDEL is asking the Department to draw a distinction between HDEL and other competitive suppliers, and between Harvard and other retail customers, that is similar to the distinction the Department drew between core and non-core gas customers in DPU 92-259. Just as non-core gas customers presented contractual arrangements for review that were somewhere between "firm" and "interruptible," Harvard as an electricity consumer is somewhere between "wholesale" and "retail." Like non-core gas customers, because of its size, Harvard has an array of options that are not available

[11] To the extent there is any elasticity in Harvard's demand for electricity, it is even possible that, should HDEL accomplish its goal of lowering Harvard's unit generation cost, consumption could increase, enhancing the utilities'

to “core” electricity customers, including self-generation and, at least to some extent, inter-fuel switching. The Department’s goal in DPU 92-259 was to adopt an approach that would allow non-core customers to choose the most economically efficient option, rather than one forced by regulatory constraints. Harvard seeks the same approach here. Given the present state of the retail market in Massachusetts, the efficient choice among Harvard’s electric supply options is most likely to be found through an affiliated retail supplier such as HDEL.

recovery of transition costs.

CONCLUSION

HDEL has shown good cause for a waiver of certain of the Department's competitive supplier licensing regulations. These regulations are unnecessary as applied to HDEL, which will have only one customer, the Harvard Group, and some of the regulations would hinder HDEL in pursuing its goal of optimizing the Harvard Group's electricity purchasing decisions. The proposed arrangement will not have a negative effect on other electricity customers, and will promote the development of the Massachusetts retail market, which will inure to the benefit of all customers. HDEL therefore respectfully requests that, pursuant to 220 CMR 11.08, the Department grant it a waiver of the regulations set forth in section I.C. above.

Respectfully submitted,

HARVARD DEDICATED ENERGY LIMTED

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